No. 88- 1715

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MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1988

BOBROW GREENAPPLE & SKOLNIK,
a Partnership Including a
Professional Corporation,

Respondent,

vs.

GERALDINE WOODS and ROBERT WOODS,

Petitioners.

Writ of Certiorari
to the United States Court
of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

WHERE DIVERSITY JURISDICTION IS INVOKED THROUGH THE PLEADING OF A FRAUDULENT OR SHAM QUANTUM MERUIT CLAIM FALSELY ALLEGED TO EXCEED $10,000 ON WHICH A DEFAULT JUDGMENT IS ENTERED, IS IT ERROR NOT TO SET ASIDE THE DEFAULT JUDGMENT AFTER THE DISTRICT COURT MAKES A FINDING THERE IS A MERITORIOUS DEFENSE THAT THE FALSE QUANTUM MERUIT CLAIM DOES NOT EXIST BECAUSE OF THE EXISTENCE OF A COMPLETED CONTRACT ON WHICH THERE IS AN UNPAID BALANCE OF LESS THAN $8,000?

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III. REFERENCES TO THE OFFICIAL AND UNOFFICIAL REPORTS ON ANY OPINIONS DELIVERED BY THE COURTS

The Memorandum slip opinion in the United States District Court for the Southern District of New York at No. 87 CIV. 4361 is appended hereto at A-1 through A-14.

The opinion in the United States Court of Appeals for the Second Circuit at No. 88-7740, reported at 865 F.2d 43 (1989), is appended at A-15 through A-19.

IV. CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction for this Petition for Writ of Certiorari is pursuant to 28 U.S.C. §2101(c) and Supreme Court Rule 20.2 which provide for the filing of a Writ of Certiorari intended to

bring a judgment in a civil action before the Supreme Court for review from a United States Court of Appeals.

The date of the judgment sought to be reviewed was January 9, 1989, which judgment was entered in the United States Court of Appeals for the Second Circuit.

V. STATUTES WHICH THE CASE INVOLVES

This case involves the diversity jurisdiction statute at 28 U.S.C. §1332 which states:

> 28 U.S.C. §1332. Diversity of Citizenship; Amount in Controversy; Costs.
>
> (a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -

(1) citizens of the different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state (defined in §1603[a] of this title) as plaintiff and citizens of a state or of different states.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.
(c) For the purposes of this section and §1441 of this title, a corporation shall be deemed a citizen of any state by

which it has been incorporated and the state where it has it principal place of business: provided further, that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen, as well as of any state by which the insurer has been incorporated and of the state where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia and the Commonwealth of Puerto Rico.

VI. CONCISE STATEMENT OF THE CASE

This is a civil action brought by the Respondent ("BOBROW" herein) against

the Petitioners ("Clients" herein) for services rendered and costs upon a legal theory of quantum meruit (unjust enrichment) in the sum of $16,431. BOBROW alleged jurisdiction against the Clients based upon diversity of citizenship and an amount in controversy in excess of $10,000 under 28 U.S.C. §1332(a)(1) [A-21]. The course of proceedings from the initiation of the litigation by BOBROW on June 22, 1987 up through the September 28, 1987 filing of the Motion by the Clients to set aside a default judgment is not in dispute and is very ably set forth in the memorandum opinion (A-1 through A-14) of District Court Judge Walker as follows:

Facts

> On June 22, 1987, Bobrow commenced this action for attorney's fees against Defendants. Bobrow alleged that between August 16, 1986 and October 24, 1986, it rendered legal services

to Defendants in conjunction with Defendants' claim in another action. Bobrow further alleged that as a result of its efforts, Defendants recovered $131,566.22. Bobrow estimated "the fair and reasonable value" of its services at $20,000, exclusive of alleged costs of $1,431. After deducting a $5,000 retainer, Bobrow alleged Defendants paid it initially, Bobrow sought $16,431 with interest from December 3, 1986, plus costs.

Defendants never answered the Complaint, with which they had been served personally.

On June 24, 1987, Bobrow obtained an Order of attachment from this Court against Defendants property, pursuant to N.Y.C.P.L.R. §6211. A Motion to confirm the Order of attachment was returnable August 10, 1987 but was adjourned upon Robert Woods Motion. The conference was rescheduled to August 14, 1987, and on that date, Defendants neither appeared nor submitted papers in opposition. On August 21, 1987, this Court confirmed the Order of attachment.

> On August 28, 1987, this Court awarded Bobrow a default judgment in the amount of $18,151.20. The default judgment was entered on August 31, 1987.
>
> On September 28, 1987, Defendants moved to set aside the default judgment pursuant to Fed.R.Civ.P. 55(c) and for relief from judgment pursuant to Fed.R.Civ.P. 60(b).

After the Motion to set aside the default judgment was filed by the Clients, Affidavits and exhibits and Counter-Affidavits with exhibits were filed by BOBROW and the Clients.

The ultimate disposition of the Clients' Motion to set aside the default judgment after the filing of Affidavits and Brief was a denial of relief because of a lack of "excusable neglect" in permitting the entry of the default judgment. This decision was made even though there was an adjudication of a

"meritorious defense" and "lack of prejudice" to BOBROW if the default judgment were opened.

Neither the district court nor the circuit court of appeals considered the jurisdictional challenge to the power of the district court in entering and thereafter sustaining the judgment. Because the "meritorious defense" is so overwhelmingly meritorious as a matter of law so as to make clear the lack of jurisdiction fraudulently invoked, the same is discussed in detail herein.

The meritorious defense is pleaded in the Motion to set aside default judgment (A-24 through A-37) at Paragraphs 6 through 8 thereof (A-27 and A-28) wherein it was pleaded that the compensation arrangement between BOBROW and the Clients was based upon a written agreement and that statements of account were previously rendered showing an

alleged demand for services rendered and costs of less than $8,000. Said allegations in the Motion to set aside the default judgment were verified by an Affidavit by one of the Clients (A-37).

The Clients also filed a Supplemental Affidavit providing more specificity as to the fee arrangement between BOBROW and the Clients (A-22 through A-45). The verified exhibits to this Supplemental Affidavit of the Clients reveals a two page fee arrangement letter (A-50 through A-52) which states in pertinent part:

> We shall bill for our services on a time basis. I am enclosing our current schedule of time charges for the various personnel in our firm. In addition, we shall charge separately for disbursements incurred in the handling of this case such as toll telephone calls, messenger service, document duplication charges, secretarial overtime, etc.

The fee schedule enclosed with said letter reveals various hourly rates for various BOBROW personnel (A-53).

Another exhibit to said Supplemental Affidavit shows an acknowledgment of the receipt of an initial retainer in the sum of $5,000 (A-54).

Another exhibit to said Supplemental Affidavit shows a statement of account (A-55 and A-56) which, after including a "special counsel" charge of $1,000 and crediting the aforementioned $5,000 retainer, produced a net amount due of $7,376 (A-56). The statement of the "special counsel" was submitted with the initial statement of account (A-57).

Another exhibit to said Supplemental Affidavit was a letter containing a supplemental billing (A-58 through A-60) showing additional charges for telephone calls increasing the amount due by the statement of account to $7,539.80.

In respect of "lack of prejudice" to BORROW if the default judgment was set aside, District Judge Walker adjudicated that no prejudice would result (A-5). The Motion to set aside the default judgment was filed on September 28, 1987, less than thirty days after the default judgment was entered on August 31, 1987 (A-3). The lack of such prejudice may also be inferred from the Counter-Affidavits of BOBROW which nowhere specifically allege specific prejudice other than the expense of presenting a defense.

VII. ARGUMENT

It is respectfully suggested that the United States Court of Appeals for the Second Circuit has rendered a decision which so far departs from the accepted and usual course of judicial proceedings (because it approves of the

fraudulent or sham invocation of diversity jurisdiction) as to call for an exercise of the Supreme Court's power of supervision. With the federal court system suffering from an overburgeoning caseload, fraudulent or sham invocation of diversity jurisdiction is an important question of federal law, and this question has not been addressed by the Supreme Court within the context of the setting aside of a default judgment based upon the fraudulent invocation of jurisdiction.

The basis for the relief requested by the Clients is set forth in F.R.Civ.P. 55 and 60. F.R.Civ.P. 55 states in pertinent part:

> Rule 55. Default...
> (c) Setting Aside Default. For good cause shown, the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

F.R.Civ.P. 60 states in pertinent part:

> Rule 60. Relief from Judgment or Order... (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ...or (6) any other reasons justifying relief from the operation of the judgment. The motion shall be made within a reasonable time...not more than one year after the judgment, order or proceeding was entered or taken...this rule does not limit the power of a court...to set aside a judgment for fraud upon the court.

It is clear from the record that on the issue of "meritorious defense",

District Court Judge Walker not only had positive, verified evidence before him to show the meritorious defense of the Clients, but he also had admissions made by BOBROW in BOBROW'S own documents and responsive filings so as to apply the meritorious defense as a matter of law. The state court decisional law cited by District Court Judge Walker on the issue of "meritorious defense" clearly indicates that BOBROW had no basis to do what it attempted to do, i.e., bring a civil action in quantum meruit for an amount in excess of $10,000 where its bill on the express contract was only $7,539.80 and where the express contract was completed. See Finkelstein v. Kins, 124 A.D.2d 92, 511 N.Y.S.2d 285 (1st Dept., 1987), wherein a law firm brought an action in quantum meruit for legal fees in excess of a bill for services rendered pursuant to the agreed-upon fee

arrangement because the defendant client therein failed to pay the bills rendered. The New York state court denied quantum meruit compensation to the law firm because the law firm was not discharged by the client and had completed the services for the client under a fee agreement pursuant to which a bill was rendered. It is stated in Finkelstein:

> The issue in this action by a firm of attorneys against a client is whether the attorneys are entitled to recover in quantum meruit an amount in excess of the bill rendered and in excess of the agreed upon fee because defendant-client has failed to pay plaintiffs' bills as rendered and claims them to be excessive.
>
> This is not a case in which plaintiffs' services were terminated. They completed their services and there was a subsequent dispute as to the amount of the bills rendered. No authority has been found, and none is cited, in support of

the proposition that when an attorney has completed his servies and has rendered a bill, he may sue in quantum meruit for an amount in excess of the bill. Nor is there authority for the doctrine that an agreed upon fee may be increased because the client has delayed payment. [511 N.Y.S.2d at 286]

.....

In this case, it is undisputed that the attorneys were not discharged. After the client had been billed, she raised questions as to the amount of the bill and made limited payments on account. Under these circumstances, there is no authority which supports the recovery of a fee in excess of the amount billed. Attorneys have no greater rights than those who render other services or sell other products. Absent express agreement, there is no right to increase the bill because of non-payment. [511 N.Y.S.2d at 288]

Because the facts underlying the "meritorious defense" are undisputed, and thus, may be applied as a matter of law, the same gives rise to two additional subsidiary and thorny issues, i.e., (1) a lack of subject matter jurisdiction because the meritorious defense must prevail, thereby reducing the amount in controversy to less than the $10,000 threshold required by 28 U.S.C. §1332; and (2) the act of filing the claim itself becomes a fraud on the Court. The pertinent provisions of 28 U.S.C. §1332 state:

> 28 U.S.C. §1332. Diversity of Citizenship; Amount in Controversy; Costs.
> (a) The district court shall have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and is between -
> (1) citizens of different states...

While the initial cases dealing with the amount of controversy in diversity litigation looked only to the plaintiff's claim for damages to determine whether the jurisdictional amount was involved, it is now well established that while the claim for recovery is prima facie controlling, a court may, under proper circumstances, look past this claim in order to determine whether the necessary amount or value is in fact in controversy; see 47 A.L.R.2d 658, §3. Fictitious or colorable claims alleged merely to create jurisdictional amount is insufficient to give federal court jurisdiction. In the case of Burks v. Texas Company, 211 F.2d 443, 47 A.L.R.2d 646 (5th Cir., 1954), it is stated:

> The plaintiff may not arbitrarily name an excessive figure above the jurisdictional amount...

> A claim evidently fictitious in character, and alleged merely to create a jurisdictional amount, is insufficient to give jurisdiction.

In the case of Arnold v. Troccoli, 344 F.2d 842, 845 (2nd Cir., 1965), it is stated:

> With mounting caseloads in our metropolitan centers, and increasing numbers of cases awaiting trial, it has become doubly important that the district courts take measures to discover those suits which ought never to have been brought in the federal court and to dismiss them when the court is convinced to a legal certainty that the plaintiff cannot recover an amount in excess of $10,000.

Based upon Finkelstein, supra, it is clear with legal certainty that no claim based upon quantum meruit may be brought by BOBROW, and the record clearly establishes that the amount of the bill

on which suit may be brought (on the express contract in a state court) is less than $8,000.

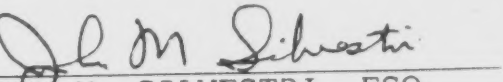
It is respectfully argued that within the context of a written fee agreement, followed by two statements of account showing a billing of $7,539.80, which is not disputed by BOBROW, there is a lack of jurisdictional amount to confer subject matter jurisdiction. The BOBROW Complaint alleges a quantum meruit claim without making any mention that there was an express contract (A-20 through A-23). BOBROW is charged with the knowledge of the law of the State of New York that where there is an express contract fixing compensation for services any action for compensation is limited to the express contract. It is horn-book law that there is no reason to imply a contract. The artifice of the BOBROW firm, the members of whom are

officers of the Court, caused the pleading of a false quantum meruit claim and concealed the express contract from the Complaint in order to fraudulently invoke jurisdiction. This is a matter which cannot be sanctioned and is subject to the supervisory power of the Supreme Court over how abuses in obtaining jurisdiction are to be adjudicated.

WHEREFORE, the Petitioners respectfully request that the within Petition for a Writ of Certiorari to review the appropriateness of judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the

Southern District of New York be granted.

Respectfully submitted,



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APPENDIX TO PETITION
FOR WRIT OF CERTIORARI

Memorandum Opinion of the
United States District
Court for the Southern
District of New York, per
Walker, J. A-1

Opinion of the United States
Court of Appeals for the
Third Circuit, per Feinberg,
Newman and Altimari, JJ. A-15

Complaint A-20

Motion to Set Aside Default
Judgment A-24

Supplemental Affidavit. A-38

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOBROW GREENAPPLE & SKOLNICK, a Partnership, including a Professional Corporation,

Plaintiff,

-against-

87 Civ. 4361 (JMW)
MEMORANDUM AND ORDER

GERALDINE WOODS and ROBERT WOODS,

Defendants.

WALKER, District Judge:

Defendants Geraldine and Robert Woods, husband and wife, move for relief from a default judgment entered against them on behalf of plaintiff Bobrow Greenapple & Skolnik, a New York law partnership ("Bobrow"), pursuant to Fed.R.Civ.P. 60(b). For the reasons stated below, defendants' motion for relief from the default judgment is denied.

Facts

On June 22, 1987, Bobrow commenced this action for attorney's fees against defendants. Bobrow alleged that between August 16, 1986 and October 24, 1986, it rendered legal services to defendants in connection with defendants' claim in another action. Bobrow further alleged that, as a result of its efforts, defendants recovered $131,566.22. Bobrow estimated "the fair and reasonable value" of its services at $20,000, exclusive of alleged costs of $1,431. After deducting a $5,000 retainer Bobrow alleged defendants paid it initially, Bobrow sought $16,431 with interest from December 3, 1986, plus costs.

Defendants never answered the complaint, with which they had been served personally.

On June 24, 1987, Bobrow obtained an Order of Attachment from this Court

against defendants' property, pursuant to N.Y.C.P.L.R. §6211. The motion to confirm the Order of Attachment was returnable on August 10, 1987, but was adjourned upon Robert Woods' motion. The conference was rescheduled to August 14, 1987, and, on that date, defendants neither appeared nor submitted papers in opposition. On August 21, 1987, this Court confirmed the Order of Attachment.

On August 28, 1987, this Court awarded Bobrow a default judgment in the amount of $18,151.20. The default judgment was entered on August 31, 1987.

On September 28, 1987, defendants moved to set aside the default judgment pursuant to Fed.R.Civ.P. 55(c) and for relief from judgment pursuant to Fed.R.Civ.P. 60(b).

Discussion

Fed.R.Civ.P. 60(b) provides, in relevant part, that "the court may relieve a party...from a final judgment...for...(1) mistake, inadvertence, surprise, or excusable neglect... or (6) any other reason justifying relief from the operation of the judgment." The decision to grant relief under the Rule is within the sound discretion of the trial court. See Davis v. Musler, 713 F.2d 907, 912 (2d Cir. 1983).

In considering an application for relief from a default judgment, the Court must consider (1) whether the default was willful; (2) whether defendant has a meritorious defense; and (3) the level of prejudice that may occur to the non-defaulting party if relief is granted. Davis, 713 F.2d at 915; Standard Enterprises, Inc. v. Bag-

it, Inc., 115 F.R.D. 38, 39 (S.D.N.Y. 1987). Further, "[p]rocedurally, on a motion for relief for an entry of a default judgment, doubts are resolved in favor of those seeking relief." Standard Enterprises, 115 F.R.D. at 39; Davis, 713 F.2d at 915. See also C. Wright & A. Miller, 11 Federal Practice and Procedure, §2857, at 160 (1973) (where judgment entered on default, court views defendant's request for relief more liberally).

After careful review of the record, the Court determines that defendants have failed to make the requisite showing for relief under Rule 60(b). While defendants offer a meritorious defense and show that no prejudice will result to Bobrow if their motion is granted, defendants have failed to show that their neglect was excusable. The Court discusses each of these elements in turn.

Defendants advance their counsel's negligence as a basis for relief under Rule.[1] Defendants assert that counsel was "overwhelmed" by personal financial problems and was "incompetent" to handle the matter entrusted to him. Further, defendants allege that counsel affirmatively misrepresented to them that he was handling the case for them responsibly and that he planned to enter into settlement negotiations with Bobrow.

Defendants argument is unpersuasive. While counsel's neglect may furnish a basis for relief, "[t]his Circuit has rather consistently refused to relieve a

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[1]Defendants' counsel submits an affidavit in which he vigorously denies the allegations of neglect defendants make against him. Defendants move to have the affidavit struck from the record both as hearsay and as a violation of the attorney-client privilege. The Court, however, determines that, even without reference to the affidavit of counsel, defendants fail to meet the standard for relief under Rule 60(b).

client of the burdens of a final judgment entered against him due to the mistake or omission of his attorney by reason of the latter's ignorance of the law or of the rules of the court, or his ability to efficiently manage his caseload. [citations omitted]." United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976).[2]. "Having voluntarily chosen his attorney, the defendant cannot avoid the consequences of the acts or omissions of his freely selected

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[2]Defendants do not state whether they seek relief under subdivision (1) or (6) of Rule 60(b). While, the Court applies the standards applicable to a motion made pursuant to subdivision (1), defendants are not entitled to relief under subdivision (6) either. Even where "counsel's conduct shows gross negligence," courts in this Circuit have "consistently indicated a reluctance" to grant relief under subdivision (6). Nemaizer v. Baker, 793 F.2d 58, 63 (2d Cir. 1986). Especially in light of defendants' own actions, discussed infra, defendants have not established their counsel's gross negligence in this action.

agent." Aberson v. Glassman, 70 F.R.D. 683, 684 (S.D.N.Y. 1976).

Further, defendants, who were personally in contact with the Court to request an adjournment of a conference scheduled for August 10, 1987, fail to explain why their absence from the rescheduled conference is their counsel's fault and not their own. Robert Woods asserts that he was on vacation from August 2, 1986 through August 18, 1986, and the he was unaware of the date of the rescheduled conference until after that date had passed. However, on August 7, while on vacation, Woods had called to request the adjournment. It is hardly unrealistic, then, to expect him to have informed himself as to the date of the rescheduled conference. Moreoever, the fact that Woods himself and not counsel had called the Court indicates that Woods was aware of the progress of the

litigation and the fact that there were deadlines to be met.

Defendants state that when they returned from vacation, their counsel assured them "that this matter was being taken care of."[3] However, Woods does not allege specifically that he informed his counsel of the adjourment at the time he called to request it, and that counsel should have been aware that the date for the conference had passed.

Moreoever, throughout their papers, defendants trumpet the fact that they were knowledgeable about their counsel's financial and personal troubles at the time he was having them. Therefore, they should not have been surprised by any failure on his part to adequately oversee this particular action. Further, despite counsel's travails, defendants continued to trust that he

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[3]Reply Affidavit of Robert Woods at ¶9.

would oversee the litigation in a responsible fashion. Indeed, defendants allege that they continued to rely upon counsel even after they instituted an involuntary bankruptcy proceeding against him in the United States District Court for the Western District of Pennsylvania. Defendants, therefore, cannot place the blame for their default solely on counsel's shoulders.

The Court determines, in sum, that in light of defendants' own neglect of Bobrow's action and their reliance upon counsel whom admittedly they knew to have personal and professional difficulties, defendant's default was not excusable within the meaning of Rule 60(b). Consequently, defendants are not entitled to relief under the Rule.

The Court also notes that, although defendants have not shown excusable neglect for their default and thus are

not entitled to relief from the default judgment, defendants have asserted a meritorious defense. Defendants assert that they had an agreement with Bobrow that Bobrow would charge for its services "on a time basis."[4] Therefore, defendants assert, Bobrow cannot seek to collect its fees under a theory of quantum meruit.[5] "No authority has been found, and none is cited, in support of the proposition that when an attorney has completed his services and

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[4]Letter from Bobrow to Stephen Israel, Ex. A to Supplemental Affidavit of Robert Woods.

[5]Defendants submit a bill rendered by Bobrow to defendants dated December 3, 1986. The bill states that it is for services rendered between March and October 1986. The bill shows an initial billing for $11,108. After subtracting for the $5,000 retainer defendants earlier paid to Bobrow, the bill showed a total "now due" $7,539. Defendants further submit a bill from Bobrow dated April 20, 1987 which states an account for $7,539.80. Bobrow has not denied the existence of the agreement or the bill. Nor has plaintiff alleged that defendants terminated their services.

has rendered a bill, he may sue in quantum meruit for an amount in excess of the bill. Nor is there authority for the doctrine that agreed upon fee may be increased because the client has delayed payment." Finkelstein v. Kins, 124 A.D.2d 92, 511 N.Y.S. 2d 285, 287 (1st Dept. 1987); Matter of Goldin, 104 A.D.2d 890, 480 N.Y.S. 2d 392 (1984). Thus, at the least, defendants have asserted a meritorious defense to Bobrow's suit to recover the reasonable value of its services.[6]

As to the third factor the Court must consider, the Court determines that

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[6]Defendants also move for sanctions against Bobrow, pursuant to Fed.R.Civ.P. 11, for bringing suit on a legal theory that defendants contend is frivolous. However, on this motion to vacate a default judgment, the Court makes only a threshold determination that defendants offer a meritorious defense. The Court does not test the sufficiency of plaintiff's legal arguments. Therefore, the Court denies defendants' motion for Rule 11 sanctions.

no prejudice would result to Bobrow from a vacation of the default judgment. Bobrow objects to the expense it would incur and delay it would suffer if defendants are granted relief from the judgment. Neither expense nor delay is a sufficient basis to show prejudice, however. Rather, Bobrow would have to show that a delay will "result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." C. Wright & A. Miller, Federal Practice and Procedure, §2699 at 536-37. Bobrow makes no such showing here.

Conclusion

While defendants have established that they could assert a meritorious defense and that plaintiff would not be prejudiced if the case were to proceed,

defendants have failed to show that their default was other than willful. Therefore, defendants' motion for relief from a default judgment entered against them by this Court is denied.

Dated: New York, New York
June 30, 1988

/s/ J. M. Walker
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 531 - August Term 1988
Argued: December 31, 1988
Decided: January 9, 1988
Docket No. 88-7740

BOBROW GREENAPPLE & SKOLNIK, a Partnership Including a Professional Corporation,

Plaintiff-Appellee,

- against -

GERALDINE WOODS and ROBERT WOODS,

Defendants-Appellants.

Before:

FEINBERG, NEWMAN and ALTIMARI,

Circuit Judges.

Appeal from the order of the United States District Court for the Southern District of New York, John M. Walker, Jr., J., denying appellants' motion for relief from a default judgment.

Affirmed.

JOHN M. SILVESTRI, Pittsburgh, PA (Geraldine & Robert Woods, Pro Se), for Defendants-Appellants.

LAWRENCE GREENAPPLE, New York, NY (Bobrow Greenapple & Skolnik, Robert A. Korren, of Counsel), for Plaintiff-Appellee.

PER CURIAM:

Geraldine and Robert Woods appeal from an order of the United States District Court for the Southern District of New York, John M. Walker, Jr., J., dated June 30, 1988, denying their motion to set aside a default judgment. Appellee Bobrow Greenapple & Skolnik ("Bobrow"), a law firm, obtained a default judgment on August 28, 1987 for $18,151.20 in its suit against the Woods for attorneys' fees. Less than a month after entry of the default, the Woods moved to have the judgment set aside under Fed.R.Civ.P. 55(c) and 60(b). The

district court denied the motion, holding that the Woods were not entitled to relief because they failed to prove that their neglect had been excusable, even though they showed that they had a meritorious defense and that setting aside the judgment would not prejudice Bobrow.

Ordinarily, we would have simply affirmed on the basis of the district court's opinion. However, an issue was raised at oral argument as to whether the default had been properly entered with appropriate notice to the appellant, and whether the less stringent standard for relief from default pursuant to Fed.R.Civ.P. 55(c) was appropriate rather than the more stringent standard for setting aside a judgment pursuant to Fed.R.Civ.P. 60(b). See Meehan v. Snow, 652 F.2d 274 (2d Cir. 1981). Accordingly, we requested

letter briefs from the parties on these issues.

We are now satisfied that the default judgment was properly entered. As required by Local Rule 10(b) of the Southern District of New York, the application for entry of default was accompanied by a clerk's certificate of default. Neither Fed.R.Civ.P. 55(b)(2) nor Local Rule 10(b) requires that, before judgment can be entered, the clerk's certificate be served upon an opposing party who has not appeared. Fed.R.Civ.P. 77(d) expressly exempts the clerk from the obligation to serve notice of entry of orders on a party "in default for failure to appear." Moreover, a default judgment was entered against the appellants in Meehan when they were only ten days late in serving their amended answer, despite their prior appearance in the action. In this case, the Woods failed to make any

appearance in the action, and never responded to any papers served upon them. Under these cirumstances, the district court did not err in applying the more stringent standard of Fed.R.Civ P. 60(b) to appellants' motion to set aside the default judgment.

Affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOBROW GREENAPPLE & SKOLNIK, a Partnership including a Professional corporation,

Plaintiff,

Civil Action No.

- against -

COMPLAINT

GERALDINE WOODS and ROBERT (BOB) WOODS,

Defendants.

Bobrow Greenapple & Skolnik ("BG&S") for its Complaint herein, states and alleges as follows:

PARTIES AND JURISDICTION

1. BG&S is a Partnership including a Professional Corporation engaged in the practice of law in the State of New York with a place of business at 630 Third Avenue, New York, New York 10017.

2. Upon information and belief, Defendants Geraldine Woods and Robert (Bob) Woods are individuals who reside at 427 Coventry, Pittsburgh, Pennsylvania 15213.

3. The Court has jurisdiction over the subject matter hereof under 28 U.S.C. §1332(a)(1), as the matter in controversy exceeds $10,000, and is between citizens of different states.

AS AND FOR A CAUSE OF ACTION

4. Between about the dates of August 16, 1986 and October 24, 1986 BG&S performed work for, and rendered legal services to, the Defendants, at their special instance and request in connection with their claim against Donald Sheldon Co., Inc. and Donald Sheldon Government Securities, Inc. for $143,009.93.

5. As a result of BG&S efforts, Defendants recovered $131,566.22 comprised of cash of $79,863.88, and Federal Home Loan Mortgage Corporation Security Number 183790, and Federal Home Loan Mortgage Corporation Security Number 183790, valued at $51,702.34.

6. The fair and reasonable value of such services is $20,000.

7. In the course of performing such services BG&S advanced and paid out various sums of money totalling $1,431 on behalf of, and for the benefit of Defendants.

8. Defendants have paid to BG&S $5,000 on account of services and disbursements leaving a balance due from Defendants to BG&S of $16,431 no part of which has been paid.

WHEREFORE BG&S demands judgment against the Defendants in the sum of $16,431 with interest from December 3, 1986.

Together with costs and disbursements of this action and such other and further relief as to this Court seems just and proper.

Dated: New York New York
June 19, 1987

Yours, etc.
BOBROW GREENAPPLE & SKOLNIK
Attorneys Pro Se

By: /s/
Lawrence Greenapple
A Member of the Firm
630 Third Avenue
New York, NY 10017
(212) 953-6633

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

BOBROW GREENAPPLE & SKOLNIK, a Partnership including a Professional Corporation,

Plaintiff,

vs. Civil Action No. 87 Civ 4361 J.M.W.

GERALDINE WOODS and ROBERT (BOB) WOODS,

Defendants.

----------X

MOTION TO SET ASIDE DEFAULT JUDGMENT UNDER RULE 55(c) AND FOR RELIEF FROM JUDGMENT UNDER RULE 60(b)

AND NOW, come Defendants and file the within Motion, of which the following is a statement;

PARTIES

1. Defendants, GERALDINE WOODS and ROBERT WOODS, are individuals residing in Pittsburgh, Pennsylvania.

2. Plaintiff, BOBROW GREENAPPLE & SKOLNIK, is a law firm conducting business in New York, New York.

NOTICE OF ENTRY OF DEFAULT JUDGMENT

3. On or about September, 1987, Defendants received from Plaintiff a document entitled "Default Judgment", having set forth therein:

A. A judgment amount of $18,151.20;

B. A dating of August 28, 1987;

C. A notation of filing with "US Dist Ct" on 8-31-87; and

D. A notation of docket entry on 9-4-87.

4. Attached to said Default Judgment was an Affidavit of LAWRENCE GREENAPPLE which, inter alia:

A. Alleged jurisdiction under 28 U.S.C. §1332(a)(1);

B. Made a statement of damages, including process server fees of $250, travel expenses of $30.75 and photocopying expenses of $181.20;

C. Had attached a copy of the Complaint; and

D. Had attached a copy of an Affidavit of Service of the Summons and Complaint and an Affidavit of Service of an Order of Attachment.

GOOD CAUSE FOR SETTING ASIDE DEFAULT JUDGMENT UNDER RULE 55(c)

5. It is believed and therefore averred that the default judgment entered should be set aside for good cause as required by Rule 55(c) for the reasons set forth herein.

6. The Complaint, at Paragraph 3, alleges subject matter jurisdiction under 28 U.S.C. §1332(a)(1), however, the amount in controversy is actually less than $10,000, in that prior to the entry of suit proceedings:

A. A written agreement was entered between Plaintiff and Defendants as to the rate of compensation;

B. Statements of account under said agreement of compensation were rendered in a total amount of less than $8,000; and

C. No demand was ever made for any sum exceeding $8,000.

A copy of the agreement and the statements are within the custody, possession and control of Plaintiff and Defendants' former counsel and are unavailable to Defendants.

7. The Complaint avers compensation upon a theory of quantum meruit instead of averring the compensation agreement, the statements of account and the demands of less than $8,000 as mentioned in the preceding paragraph as if said agreement, statements of account and demands did not exist.

8. Defendants allege, in respect of services rendered under said written agreement, monies are due and owing under the first and third statements rendered in amounts totaling less than $7,000, however, the second statement rendered in the sum of $1,000 is in question. It is further alleged by Defendants that under no circumstances are monies due and owing for services in excess of $8,000.

9. The costs and disbursements attached to the Affidavit of LAWRENCE GREENAPPLE in respect of the process server fee in the sum of $250, the

travel expense fee in the sum of $30.75 and the photocopy expense in the sum of $181.20 are not believed to be proper items of taxable costs, in that:

A. Service of process in the manner set forth in the Affidavits was unnecessary, in that it is believed and therefore averred that no attempt at service of process was made under Rule 4(c)(2)(C)(ii) which does not require process server fees or other expenses; and

B. Neither the travel expense nor the photocopying expenses are documented or otherwise verified as being costs which are appropriately taxable costs.

10. In respect of the interest claim of $1,077.69, the same appears to be miscomputed, in that if the principal

amount is $16,431 (which principal amount is denied as set forth hereinabove) and the interest rate is nine percent (9%) (which interest rate has not been verified to Defendants and is therefore denied) for the period from December 3, 1986 through August 26, 1987 (which time period is approximately several days less than eight [8] months), then at nine percent (9%) interest, the amount of interest should be $985.86.

11. The failure to file a responsive pleading to the Complaint was not due to neglect on the part of Defendants, in that upon receipt of the Summons and Complaint, the same, together with prior correspondence, were turned over to predecessor counsel, JOSEPH E. HUDAK, on whom Defendants relied to review the Complaint, debrief the Defendants of facts, accomplish appropriate legal research and prepare

an appropriate response to the Complaint, however, JOSEPH E. HUDAK did not act as expected, and in fact:

A. Said predecessor counsel became overwhelmed and overcome by personal financial problems, to the neglect of undertakings, including the undertaking of the defense of the within action;

B. Said predecessor counsel is presently a debtor in an involuntary case under the Bankruptcy Code in the United States District Court for the Western District of Pennsylvania, which involuntary case was initiated against said predecessor counsel between the time Defendants turned over the Summons, Complaint and other papers and the

time of the entry of the default judgment; and

C. Said predecessor counsel refuses to turn over to Defendants or successor counsel the Summons, Complaint and other papers delivered to said predecessor counsel by Defendants.

12. It is believed and therefore averred that the default judgment should be set aside under Rule 55(c), in that:

A. The dollar amount of the default judgment entered is more than double the amount to which Plaintiff is entitled under the meritorious defense set forth herein to the effect that the relationship between Plaintiff and Defendants was based upon a written

compensation agreement under which less than $8,000 is owed;

B. There are various items of costs which were not necessary costs as set forth herein, and thus, are not taxable costs;

C. The computation of interest is believed to be incorrect; and

D. A reasonable excuse exists for the failure of Defendants to ma'e a timely responsive filing to the Complaint.

RELIEF FROM JUDGMENT UNDER RULE 60(b)

13. In respect of Plaintiff making an averment that Plaintiff holds a claim under a theory of quantum meruit in the sum of $20,000, when in fact there was a

written agreement for compensation under which statements were rendered amounting to less than $8,000, it is believed and therefore alleged that such an averment by Plaintiff without the disclosure of the written agreement or the statements rendered thereunder constitutes a misrepresentation or fraud as to the character of the relationship between the parties, coupled with a concealment, so as to entitle Defendants to relief from judgment.

14. It is believed and therefore alleged that because Plaintiff is a law firm, Plaintiff is chargeable with knowledge that a claim for quantum meruit does not lie where there is an express agreement for compensation and that the concealment of the express agreement referenced hereinabove, in conjunction with the averment of a debt arising from a quantum meruit relationship, constitutes misconduct of an

adverse party under Rule 60(b), so as to entitle Defendants to relief from the judgment.

CLAIM FOR ATTORNEY FEES AND COSTS UNDER RULE 11

15. It is believed and therefore alleged that the signing of the Complaint and the papers associated with the entry of default judgment, given the fact that the same made a claim of $20,000 upon a theory of quantum meruit where Plaintiff and Plaintiff's counsel knew that there was a written agreement and statements rendered thereunder for a balance due of less than $8,000, is in violation of Rule 11, in that such papers are not grounded in fact and are unwarranted by existing law.

16. It is believed and therefore alleged that the fees and expenses associated with the setting aside of the

default judgment should be imposed upon Plaintiff under Rule 11.

WHEREFORE, Defendants request this Honorable Court for an Order setting aside the default judgment, or in the alternative, granting relief from judgment and for attorney fees and expenses associated with the preparation, filing and litigation of the within Motion.

Respectfully submitted,

/s/

JOHN M. SILVESTRI, ESQ.
Attorney for Defendants
828 Frick Building
Pittsburgh, PA 15219
(412) 391-0958

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

BOBROW GREENAPPLE & SKOLNIK, a Partnership including a Professional Corporation,

Plaintiff,

vs. Civil Action No. 87 Civ 4361 J.M.W.

GERALDINE WOODS and ROBERT (BOB) WOODS,

Defendants.

AFFIDAVIT

----------X

I, ROBERT WOODS, declare under the penalty of perjury that I have read the foregoing Motion and that the allegations of fact contained therein are true and correct to the best of my knowledge, information and belief.

Executed on 9/24/87

/s/
ROBERT WOODS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOBROW GREENAPPLE & SKOLNIK, a Partnership, including a Professional Corporation,

Plaintiff,

Civil Action No. 87Civ.4361 J.M.W.

vs.

SUPPLEMENTAL AFFIDAVIT

GERALDINE WOODS and ROBERT (BOB) WOODS,

Defendants.

SUPPLEMENTAL AFFIDAVIT

I, ROBERT WOODS, an adult individual, do hereby state and depose as follows:

ESTABLISHMENT OF CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES AND HISTORY OF BILLING

1. The BOBROW, GREENAPPLE & SKOLNIK firm was retained through a referral by Pittsburgh legal counsel STEPHEN ISRAEL, ESQ. Through this referral, a letter agreement dated

April 2, 1986 was mailed by the BOBROW firm to ATTORNEY ISRAEL, together with the fee schedule enclosure. Said letter agreement was executed by my Wife, GERALDINE WOODS, as requested by the BOBROW firm through LAWRENCE GREENAPPLE, ESQ. A copy of said letter correspondence and fee schedule is attached as Exhibit A.

2. Following the establishment of the attorney-client relation referenced in paragraph 1 above, a $5,000 retainer was forwarded to the BOBROW firm which was acknowledged received by the BOBROW firm by a statement dated July 10, 1986. Attached as Exhibit B is a copy of said acknowledgement statement.

3. The first accounting for services rendered by the BOBROW firm and costs expended was unitemized as to what services were rendered by what attorneys and when, which statement included a reference to special counsel JEFFREY L.

ZIVYAK for $1,000, as well as an attached statement from JEFFREY L. ZIVYAK dated November 12, 1986 referring to a prior bill dated October 1, 1986. The ZIVYAK statement does not indicate what services were rendered or when, and the bill referenced in the ZIVYAK statement was not provided. Attached hereto as Exhibit C is the BOBROW firm statement dated December 3, 1986 with the ZIVYAK statement dated November 12, 1986.

4. The next communication relative to billings and accounts of the BOBROW firm was a letter dated April 20, 1987 which enclosed an updated statement of the same date with additional telephone charges of $163.80 without any description as to dates, persons and telephone numbers called or subject matter and reasons for the telephone calls. These additional telephone calls increased the claimed bill to $7,539.80. Attached

hereto as Exhibit D is said letter dated April 20, 1987 with the enclosed statement.

MERITORIOUS DEFENSE

5. The Complaint makes no reference whatsoever to the aforementioned establishment of the contractual relation between the parties or the statements of the BOBROW firm for services rendered and costs advanced, but instead, makes a claim at paragraph 6 of the Complaint which states:

> 6. The fair and reasonable value of such services is $20,000.

which claim at paragraph 6 of the Complaint is in fact in excess of the fair and reasonable value of the services of the BOBROW firm was agreed to be as set forth in the fee schedule

attached hereto as a part of Exhibit A, and is in excess of the calculated fair and reasonable value of the agreed upon time charges as per the BOBROW firm statements attached hereto as Exhibits B, C and D.

6. Furthermore, the BOBROW Complaint makes no mention whatsoever of the involvement of JEFFREY L. ZIVYAK or whether the ZIVYAK bill is really included in the BOBROW Complaint.

7. In respect of the BOBROW claim for services rendered and costs advanced, and assuming the same includes the fees of JEFFREY L. ZIVYAK, ESQ., the same cannot have a value in excess of $7,539.80 as per the statements rendered in accordance with the agreement as to the value of services rendered referenced in Exhibit A. The figure of $7,539.80 as a maximum claim is based upon the admissions of the BOBROW firm

as set forth in the Exhibits B through D attached hereto.

8. In respect of the necessity or need for the services rendered and the applicability of the costs, the statements of account rendered by the BOBROW firm are deficient in lacking any detail as to (a) when particular services were rendered; (b) the attorney rendering the particular services; (c) a description of the activities comprising the services on the date specified by the attorney specified; and (d) the time allotment for the particular services rendered by a particular attorney on a particular date. Furthermore, there is no itemization as to dates of costs advanced or disbursements with a description or disbursement amount by date.

9. It is believed that the type of detail accounting described in the preceding paragraph is reasonable to

expect from a professional, in that such detail of accounting is required in the normal course from the Federal Court system in the United States Bankruptcy Court for the Western District of Pennsylvania in accordance with local Rules governing fee applications, a copy of which is attached as Exhibit E. Said Exhibit E requires an itemization of services by category of service, as well as chronology of service. It is believed, and therefore averred, that at a very minimum, the BOBROW firm should submit a detailed statement indicating the chronology of services by date, attorney, description of service and time expended so that it may be determined as to whether the gross services claimed were within the scope of the contractual engagemenet agreement and were necessary to fulfill the objects of the agreement. Furthermore, it is believed that a chronology of services

by attorney must be available, in that it is standard practice that lawyers keep time sheets which set forth the "when", the "who", the "what" and the "time".

10. Whether the dollar amount claimed for services and costs advanced as set forth in the statement as being a total of $7,539.80 is correctly due and owing is the subject of a review of time sheets or the itemized documentation which has never been provided by the BOBROW firm. Clearly, the judgment entered exceeds in excess of $10,000, the amount actually claimed by billings under the engagement agreement, and in respect of the amount claimed under the engagement agreement, it is undetermined as to what amounts are really due and owing, especially within the context of $5,000 already having been paid.

GOOD CAUSE

11. In addition to the meritorious defenses set forth above, there is good cause to excuse the default entered.

12. In respect of attempting a defense, the Complaint served upon the Defendants was turned over to local counsel, JOSEPH E. HUDAK, on whom Defendants relied to review the Complaint, debrief the Defendants of facts and accomplish appropriate legal research in order to prepare an appropriate response to the Complaint, however, JOSEPH E. HUDAK, did not act as expected.

13. Defendants reasonably relied in turning the BOBROW firm's Complaint over to JOSEPH E. HUDAK, a Pittsburgh attorney, in that (a) the Defendants knew JOSEPH E. HUDAK to be admitted to practice before the Federal District Court in Pittsburgh and believed that

all Federal District Courts have the same basic rules and administer the same law; (b) JOSEPH E. HUDAK did not advise the Defendants that he lacked the competence or the time to devote to this matter; and (c) JOSEPH E. HUDAK had represented that he had contacted the BOBROW firm, specifically LAWRENCE GREENAPPLE, ESQ., for the purpose of negotiating a settlement consistent with Defendants' position that additional monies were due, but the precise amount needed verification.

14. JOSEPH E. HUDAK did not act as expected or as he advised Defendants, in that (a) Attorney HUDAK became overwhelmed and overcome by personal financial problems to the neglect of undertakings, including undertaking the defense of the BOBROW firm's Complaint; (b) predecessor counsel HUDAK is presently a Debtor in involuntary bankruptcy proceedings in the United

States District Court for the Western District of Pennsylvania, which proceedings occurred between the time the Defendants were served with the Summons and Complaint and the time of the entry of the default judgment; and (c) said predecessor counsel, HUDAK, refused to turn over to Defendants or successor counsel the Summmons, Complaint and other papers delivered to him.

15. It was believed that to the extent local counsel in New York was necessary, JOSEPH E. HUDAK could have identified local counsel in much the same way Attorney STEPHEN ISRAEL, a Pittsburgh lawyer, referred the BOBROW firm for engagement as is documented in the letter from the BOBROW firm to Attorney ISRAEL in Exhibit A attached hereto.

I, ROBERT WOODS, declare under the penalty of perjury, that I have read the

foregoing Supplemental Affidavit, and that the allegations of fact contained therein are true and correct to the best of my knowledge, information and belief.

Executed on Feb. 16, 1987

/s/
ROBERT WOODS

DEFENDANT'S EXHIBIT A

[BOBROW GREENAPPLE & SKOLNIK Letterhead]

April 2, 1986

Stephen Israel, Esq.
Messrs. Duffy, Israel & Specter
1109 Grant Building
Pittsburgh, PA 15219

Dear Steve:

Thank you for referring to me the case of Geraldine Woods against Donald Sheldon & Co., Inc. We have reviewed the document you have forwarded to us and, as a preliminary matter it appears as that the case has sufficient merit to warrant pursuing it.

There are a number of matters that are not revealed by the documents and

we will have to inquire into them promptly in connection with preparing the claim for trial. The following questions should be addressed immediately. Obviously there may be others.

1. What were the circumstances surrounding the initiation of the account which is the subject of the claim? Was there an information statement or prospectus issued by Donald Sheldon & Co., Inc. or Donald Sheldon Government Securities, Inc.?

2. Who carried on the business in the account? Was it Bob Woods or Geraldine Woods? Who at Donald Sheldon Co., Inc. was handling the transactions?

3. Why did Geraldine Woods write checks to Donald Sheldon & Co., Inc. despite the fact that all confirmations were issued by Donald Sheldon Government

Securities, Inc.? Where did she get the name of the payee? What conversations if any, did she have with any employees of either brokerage firm concerning the name of the payee or the name that appeared on the confirmations or the monthly statements?

4. Did either of Bob Woods or Geraldine Woods have an account with either Donald Sheldon & Co., Inc. or Donald Sheldon Government Securities, Inc. other than account no. 4-99085-1-0?

The answers to the above questions will prove to be very significant. In addition, we will have to find out from the file in the bankruptcy court how these two brokerage firms conducted their business. Once we are retained, we shall contact the bankruptcy trustees and initiate an examination of the files of the two debtors for the purpose of

ascertaining the procedures they employed for separating the two firms from each other.

We understand that our responsibility shall be to organize the evidence and witnesses and to conduct a trial of the issues relating to the obligation of the Securities Investors Protection Corporation to remit to Geraldine Woods the net value of her account on the date of termination of business of the two brokerage firms. We shall be responsible for assembling the evidence in support of Mrs. Woods' claim, preparing the case for trial and conducting the trial. We shall bill for our services on a time basis. I am enclosing our current schedule of time charges for the various personnel in our firm. In addition, we shall charge separately for disbursements incurred in the handling of this case such as toll telephone

calls, messenger service, document duplication charges, secretarial overtime, etc.

It is not possible to forecast the total charges at this time. It should be possible to do so after we have become more involved in the case and had an opportunity to examine the evidence and the law.

We suggest that a retainer of $5,000 is appropriate in the circumstances and accordingly request that you confirm our understanding by signing and returning to us the enclosed copy of this letter together with your client's check for $5,000 which shall be applied

to time charges and disbursements as incurred.

Sincerely yours,

/s/

Lawrence Greenapple

Accepted and Agreed to:

/s/ _____

Geraldine Woods

[BOBROW GREENAPPLE & SKOLNIK Letterhead]

FEE SCHEDULE

HENRY B. BOBROW	$200 PER HOUR
LAWRENCE GREENAPPLE	$200 PER HOUR
STEVEN D. SKOLNIK	$175 PER HOUR
WALTER A. BOBROW	$175 PER HOUR
KEITH BERMAN	$175 PER HOUR
JACOB S. SHAKARCHY	$150 PER HOUR
SHERYLL B. DORF	$100 PER HOUR
PATRICK J. MURPHY	$100 PER HOUR
PARALEGAL	$ 50 PER HOUR

DEFENDANT'S EXHIBIT B

July 10, 1986

Mrs. Geraldine Woods
c/o Steven Israel, Esq.
Messrs. Duffy, Israel & Specter
1109 Grant Building
Pittsburg, PA 15219

Re: Woods v. Donald Sheldon & Co., Inc. and Donald Sheldon Government Securities, Inc.--SIPIC Claim. Per Retainer Agreement dated April 2, 1986.

Received on account 7/10/86 $5,000.00

DEFENDANT'S EXHIBIT C

[BOBROW GREENAPPLE & SKOLNIK Letterhead]

December 3, 1986

Mr. & Mrs. Robert and Woods
427 Coventry
Pittsburgh, PA 15213

For Professional Services Rendered

For professional services rendered between March and October 1986 in connection with processing claim against Sheldon Government Securities arising out of customer transaction including organization and analysis of documents, conferences with counsel for Donald Sheldon government securities, Securities Investors Protection Corporation, extensive conferences with client, preparation

of petition opposing proposed settlement, appearance at bankruptcy court, negotiation, drafting and conclusion of filing and service of same, stipulation reserving to Geraldine Woods right against individual directors of Donald Sheldon Co., Inc. miscellaneous related matters.

Time Charges		$11,108.00
Lawrence Greenapple	7.5 hrs.	@$200/hour
Henry B. Bobrow	0.5 hrs.	@$200/hour
Steven D. Skolnik	22.8 hrs.	@$175/hour
Lawrence Sousie	36.8 hrs.	@$85/hour
Paralegals	7.8 hrs.	@$50/hour

Disbursements

Document duplication charges	$146.50
Toll telephone calls	26.65
Messenger service	29.45
Court service	22.90
Travel, miscellaneous	42.50
	$268.00
Fees of Special Counsel, Jeffrey I. Zivyak, Esq. with respect to Bankruptcy matters (See Annexed Statement)	$1,000.00
Total:	$12,376.00
Received on retainer:	5,000.00
TOTAL NOW DUE:	$ 7,376.00

JEFFREY L. ZIVYAK

Attorney At Law

875 Third Avenue

New York, New York 10022

(212) 832-1930

Counsel to Breslow & Walker

November 12, 1986

Bobrow Greenapple & Skolnik

630 Third Avenue

New York, New York 10017-6797

S T A T E M E N T:

As per bill dated October 1, 1986 -
(Matters relating to claim of
Geraldine Woods in The Estate of
Donald Sheldon Securities, Inc.)

$1,000.00

DEFENDANT'S EXHIBIT D

[BOBROW GREENAPPLE & SKOLNIK Letterhead]

April 20, 1987

Mr. & Mrs. Robert Woods
427 Coventry
Pittsburgh, PA 15213

Dear Bob:

I have tried for several weeks to reach you by telephone to discuss the payment of our unpaid bill of December 3, 1986. In earlier conversations, you had indicated to me that it would be paid. As you well know, to date it has not been paid. I telephoned Stephen Israel and was informed that you had terminated your relationship with him. I hope that that fact is not coloring your thinking about payment of

our bill. Although some aspects of the matter we handled were the subject of communications with Mr. Israel, we did not act as his counsel or his agent but yours.

We extended ourselves in expending time directly in your behalf and retaining the services of a bankruptcy lawyer to assist in successfully concluding the result that you sought. I am sure you recognize the validity of the obligation and I would appreciate the payment of it at this time. I am enclosing a statement of the December 3, bill plus a current bill which reflects and additional $163.80 of toll telephone calls that came through after the December 3 bill was prepared. We would

greatly appreciate your payment of this bill at this time.

Sincerely,

/s/

Lawrence Greenapple

LG/scr

Enclosure

[BOBROW GREENAPPLE & SKOLNIK Letterhead]

April 20, 1987

Mr. & Mrs. Robert Woods
425 Coventry
Pittsburgh, PA 15213

For Professional Services Rendered

Toll telephone calls	$163.80
Balance due, statement rendered December 3, 1986	$7,376.00
TOTAL	$7,539.80

LG/scr

No. 88-1715

FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOBROW GREENAPPLE & SKOLNIK,
a Partnership Including a Professional Corporation,
Respondent,

—v.—

GERALDINE WOODS and ROBERT WOODS,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

LAWRENCE GREENAPPLE, ESQ.
Attorney for Respondent
630 Third Avenue
New York, New York 10017
(212) 953-6633

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NO REVIEW BY THIS COURT IS APPROPRIATE WITH RESPECT TO THE DEFAULT JUDGMENT IN THIS CASE. THE SECOND CIRCUIT COURT OF APPEALS EMPLOYED WELL ESTABLISHED PRINCIPLES OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO SET ASIDE THE ENTRY OF PETITIONERS' DEFAULT ON THE GROUND THAT IT WAS WILLFUL.	
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QUESTIONS PRESENTED FOR REVIEW

1. WHERE A DEFENDANT AGAINST WHOM A DEFAULT JUDGMENT HAS BEEN ENTERED SEEKS TO REOPEN THE DEFAULT SO THAT DEFENDANT CAN ASSERT A DEFENSE WHICH, IF TIMELY ASSERTED WOULD HAVE RAISED AN ISSUE OF FACT REQUIRING A TRIAL, MAY THE DISTRICT COURT IN THE EXERCISE OF ITS DISCRETION PURSUANT TO FRCP 55, REFUSE TO VACATE THE DEFAULT ON THE GROUND THAT IT WAS WILLFUL?

THE SECOND CIRCUIT ANSWERED THIS QUESTION: YES.

RESPONDENT CONTENDS THE ANSWER IS: YES.

2. IS THE DISTRICT COURT'S EXERCISE OF DISCRETION IN DENYING PETITIONERS THE OPPORTUNITY TO ASSERT A DEFENSE WHICH WOULD HAVE RAISED A TRIABLE ISSUE OF FACT IF TIMELY ASSERTED, A DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS?

THE SECOND CIRCUIT ANSWERED THIS QUESTION: NO.

RESPONDENT CONTENDS THE ANSWER IS: NO.

3. IS THERE ANY BASIS FOR EXERCISE OF CERTIORARI JURISDICTION BY THE SUPREME COURT OF THE UNITED STATES?

THE CIRCUIT COURT DID NOT ADDRESS THIS QUESTION.

RESPONDENT CONTENDS THE ANSWER IS: NO.

REASON FOR DENYING CERTIORARI

NO REVIEW BY THIS COURT IS APPROPRIATE WITH RESPECT TO THE DEFAULT JUDGMENT IN THIS CASE. THE SECOND CIRCUIT COURT OF APPEALS EMPLOYED WELL ESTABLISHED PRINCIPLES OF LAW IN AFFIRMING THE DISTRICT COURT'S REFUSAL TO SET ASIDE THE ENTRY OF PETITIONERS' DEFAULT ON THE GROUND THAT IT WAS WILLFUL.

District Judge Walker of the United States District Court for the Southern District of New York carefully considered multiple affidavits and other documents filed by Petitioners between September of 1987 and February of 1988 in which Petitioners, seeking to vacate a default judgment and have an opportunity to defend an action for recovery of legal fees, asserted that their failure to respond to a complaint, notice of attachment, notice of motion and letters advising of an adjourned return date personally requested by Petitioners was excusable, and that if given an opportunity they would assert a meritorious defense. Judge Walker found

that the defense described by Petitioners (but not proved by them) was meritorious but nevertheless refused to reopen the default because he also found that their default was willful.

In their petition for certiorari to this Court as well as in their appeal to the Second Circuit Court of Appeals, Petitioners have fixed their attention upon Judge Walker's finding that the defense they proposed to assert was a meritorious one and have made the unfounded leap of logic that the mere assertion of it is the proof of it. They also assume that they have proved that Respondent law firm engaged in "fraudulent or sham invocation of diversity jurisdiction" (Petition page 15) asserted a "false quantum meruit claim" (Petition page 1) and perpetrated a "fraud on the Court." (Petition page 20). There is no basis in the record for these scurrilous charges.

Indeed, as Respondent argued in the Second Circuit, had it the need and the opportunity to counter the defense, it would have demonstrated conclusively that unlike the plaintiffs in the case of Finkelstein v. Kins, 124 A.D.2d 92, 511 N.Y.S.2d 285 (1st Dept. 1987) upon which Petitioners rely, its services were not completed. Petitioners had requested that Respondent obtain for them the right to assert a claim against the individual principals of Donald Sheldon & Co., Inc. and Donald Sheldon Government Securities Inc. and, as demonstrated by the settlement on the record at the Bankruptcy Court Respondent had uniquely succeeded in doing that. No other claimant in the bankruptcy proceeding had accomplished the reservation of right to pursue a claim against those individual principals. Respondent was prepared to pursue that claim when Petitioners discharged the law

firm by failing to pay its bills. Respondent was therefore not limited by New York law to the amount of its retainer agreement but had the right to seek recovery in quantum meruit.

The Petition is totally lacking in merit. It assumes that Judge Walker found that the Respondent law firm had perpetrated a fraud upon the court and despite that finding refused to reopen a default judgment in favor of the law firm. Such a refusal would indeed be a departure from the usual course of judicial proceedings. However, no such finding was made. The only finding made was that the proposed defense, if asserted, had sufficient merit to raise a triable issue of fact. The proposed defense, although found to be meritorious for purposes of a motion to vacate a default judgment, must still be proved at trial to defeat Respondent's claim for recovery of the value of

services rendered. Keegel, et. al., v. Key West & Caribbean Trading Company, Inc., et. al., 627 F.2d 372 (2d Cir. 1980). Nevertheless, no trial was ordered because Petitioners had willfully defaulted and had forfeited their right to a trial.

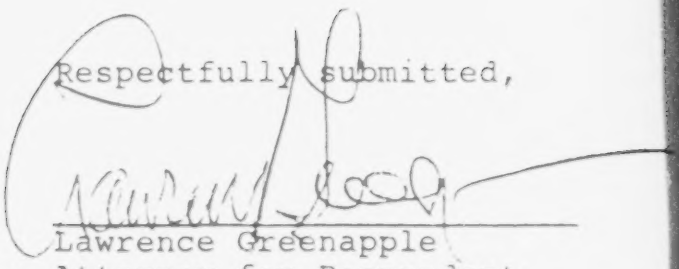
That proposition is one about which the District Courts, the Circuit Courts of Appeal, and this Court are in complete agreement. There are no contrary holdings. Nor should there be any.

CONCLUSION

The Court of Appeals properly affirmed the order of the District Court which denied Petitioners' motion for relief from a default judgment based upon a finding that the Petitioners' default was willful. No abuse of discretion was found. There is no basis in fact or law for granting Certiorari.

Dated: New York, NY
May 22, 1989

Respectfully submitted,



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